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Nos. 88-1198 and 88-1333

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL TRADE COMMISSION, PETITIONER,

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.,

v.

FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS/ CROSS-PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Criminal Defense Lawyers ("NACDL") has obtained the written consent of the parties to file this brief, and has filed consent letters with the Court.

The NACDL is a non-profit corporation with a nationwide membership of more than 5,000 lawyers. It is concerned with the protection of individual rights, with reform of criminal law practice and procedure, and with improvement of the conditions under which criminal law practitioners must work, particularly those practitioners who provide counsel to indigent defendants, whether as public defenders or as court-appointed lawyers. The NACDL supports the efforts of underpaid court-appointed counsel, such as the respondents/cross-petitioners in this case, to increase their statutory fees and fee limits.

SUMMARY OF ARGUMENT

Local governments use a variety of methods to fulfill their constitutional mandate to provide free legal counsel to indigent criminal defendants. The District of Columbia used both a Public Defender Service and appointed private counsel to meet this obligation. Only a small proportion of those eligible for appointment to criminal cases in the District of Columbia actually volunteered for them. Although the trial court had authority to appoint attorneys from a much larger segment of the bar than that represented by the respondents/cross petitioners, it relied only upon those who volunteered to accept cases.

Because lawyers do not have the power to refuse to accept criminal cases when appointed to represent indigents, and because refusal to accept such appointments may be punishable as contempt, the court, and not the respondents, had complete control over the supply of attorneys available to represent indigent defendants. Since they could not have refused to accept any cases when appointed, the function of the respondents' "boycott" was purely to communicate the lawyers' distress over the level of statutory fees and its effect on the quality of legal representation offered to indigents.

While the effect of the respondents' boycott, an increase in statutory fees, was anti-competitive, their otherwise lawful efforts to achieve that effect are protected under any reading of the *Noerr-Pennington* doctrine.

ARGUMENT OF LAW

I. Federal Anti-Trust Legislation Does Not Reach the Respondents' Conduct

The Court must here determine whether the Sherman Act[1] and the First Amendment[2] permit the federal government to punish a group of lawyers who, as part of an effort to win passage of legislation which would increase fees paid to appointed criminal defense counsel, noisily stopped their voluntary acceptance of appointed cases. The court of appeals held that the Sherman Act applies to the lawyers' behavior, but found that the First Amendment prohibits government sanctions against the lawyers, absent a showing that the lawyers have economic power in the relevant market. *Superior Court Trial Lawyers Association v. Federal Trade Commission*, 856 F.2d 226 (D.C. Cir. 1988) ("*S.C.T.L.A.*"). We believe that the lawyers' conduct was not coercive but rather was persuasive, and that its essentially communicative aspect shielded it, under the First Amendment, from government reprisal.

A. The District of Columbia Required Only Those Lawyers Who Volunteered to Do So to Accept Appointments to Criminal Cases

Every jurisdiction in the United States must provide, at government expense, counsel to criminal defendants who are unable to raise enough funds to pay for an attorney by their own devices.[3] State and local governments use a variety of methods to fill this prescription, none without

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[1] 15 U.S.C. 1.

[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[3] See, e.g., *United States v. Cronic*, 466 U.S. 618 (1984); *Strickland v. ashington*, 466 U.S. 668 (1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932).

cost to taxpayers or the bar. The D.C. government uses a hybrid system. It combines salaried public defenders, who are city employees, with appointed private counsel, sometimes known as "Fifth Streeters,"[4] who are, typically, solo practitioners working from their homes or from part-time offices without secretarial assistance, and who derive nearly all of their income from statutory fees earned in appointed criminal cases.[5]

Not surprisingly, few lawyers are willing to lead the sort of marginal professional existence eked out by the Fifth Streeters. At the time of the boycott, only about 1,200 lawyers had registered for appointed criminal cases. Pet. App. 4a. Most appointed cases, however, were apportioned among an even smaller group of approximately one hundred lawyers. *Id.* To be assigned a case on a given day, an attorney must not only have pre-registered, but must also have telephoned the CJA office of the D.C. Public Defender Service between 7:45 and 8:15 a.m., indicating a willingness to accept a new case that day. *S.C.T.L.A.*, 856 F.2d at 228. Apparently, only a small proportion of even those attorneys who had registered regularly volunteered for appointments in this fashion.

In 1982, the year before the Fifth Streeters' boycott, appointed counsel handled some 19,475 misdemeanor cases and 4,000 felony cases.[6] Pet. App. 157a. For a time, this overwhelming reliance on volunteer appointed counsel was satisfactory to nearly all concerned. It satisfied the Fifth Streeters, by providing them with ample legal work. It

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[4]The tag, "Fifth Streeter," refers to the location of the Superior Court and of the offices of some of the attorneys who voluntarily accept appointment to criminal cases. More importantly, it distinguishes that segment of the bar who regularly represent criminal defendants in Superior Court from more prosperous "uptown lawyers," many of whom have offices on streets connected to Connecticut Avenue. Pet. App. 140a, n. 2.

[5]The four named respondents/cross-petitioners all answered to this description. Pet. App. 148a-151a.

[6]This amounted to eighty-five percent of all indigency cases. Pet. App. 157a.

satisfied the City Council and its constituent taxpayers, by providing ever-unpopular-to-pay-for indigent defense services at bargain basement prices.[7] It satisfied the bench, by providing self-propelled, low-maintenance machinery which matched the names of appointed-lawyers-to-be with the names of indigent criminal defendants. Perhaps it also satisfied some of the uptown lawyers, by providing relief from the likely unpleasant and unremunerative obligation to provide legal assistance to indigent criminal defendants.[8]

B. The Respondents Lacked the Power to Affect the Supply of Indigent Criminal Defense Lawyers

This method was not the only one available to the D.C. Superior Court to provide counsel to indigent defendants. It

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[7]The 1982 payments to appointed counsel in D.C. totaled $4,579,572. Pet. App. 157a. The appropriation to the Public Defender Service ("P.D.S."), which handled only about eight to ten per cent of all indigent cases, was $3,306,000. *Id.* This disparity may be partly attributable to the P.D.S. practice of handling mostly serious and complex cases, but the figures also suggest that appointed criminal defense counsel in D.C. worked cheaply. As early as 1975, the blue-ribbon Austern-Rezneck committee, working under the auspices of the Judicial Conference of the D.C. Circuit and the D.C. Bar, extensively studied indigency practice in the District, and concluded that rates paid to appointed defense attorneys were too low and that they must be increased to ensure effective representation and adequate compensation to counsel. Pet. App. 170a-173a.

[8]See, e.g., ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *The Defense Function* §1.5 (1971): "The bar should encourage through every available means the widest possible participation in the defense of criminal cases by experienced trial lawyers. Lawyers active in general trial practice should be encouraged to qualify themselves for participation in criminal cases both by formal training and through experience as associate counsel"; ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *Providing Defense Services* §2.2 (1968): "Assignments [to appointed criminal cases] should be distributed as widely as possible among the qualified members of the bar. Every lawyer licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be included in the roster of attorneys from which assignments are made".

had the manifest power to require all members of the D.C. bar, or all practicing trial lawyers, or all practicing criminal defense lawyers, or even the 1,200 registered lawyers, to shoulder a share of the burden. The duty of a trial court to appoint counsel to represent indigent defendants charged with serious crimes is clear, and its power to do so, even in the absence of a statute, cannot be questioned. *Powell v. Alabama*, 287 U.S. 45, 73 (1932). "Attorneys are officers of the court, and are bound to render service when required by such an appointment." *Id.* Courts have consistently upheld their power to appoint counsel to involuntarily represent indigent defendants, even without compensation.[9]

Under this plenary authority, the D.C. Superior Court could have chosen, at any time, to expand the pool of attorneys from which appointments were made, and it could have required those in the pool, whether expanded or not, to accept cases. Instead, it chose to meet its recurring need for appointed counsel by assigning cases only to those lawyers who picked up the telephone and asked for them.

C. The Respondents' Conduct Was Purely Communicative

When the Fifth Streeters collectively stopped picking up the telephone, they did not and could not have relieved themselves of the obligation to represent any defendants that the court may have ordered them to assist. As mem-

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[9]See, e.g., *Waters v. Kemp*, 845 F. 2d 260, 263 (11th Cir. 1988) ("As an officer of the court, a lawyer has a fundamental duty to perform services pro bono for indigents when called upon by the court.... An attorney may be relieved of his duty to accept a court appointment only when the appointment is likely to impede the due administration of justice"); *United States v. Acceturo*, 842 F. 2d 1408, 1412 (3rd Cir. 1988); *Williamson v. Vardeman*, 674 F. 2d 1211, 1214 (8th Cir. 1982); *United States v. Dillon*, 346 F. 2d 633, 635 (9th Cir. 1965), *cert. denied* 382 U.S. 978 (1966) ("A lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order"); *In Re Frankel*, 293 A. 2d 196 (N. J. 1972), *cert. denied* 409 U.S. 1125 (1973); *In Re Meizlish*, 196 N. W. 2d 129 (Mich. 1972); *People v. Hutchinson*, 195 N. W. 2d 787 (Mich. App. 1972).

bers of the bar, they shared that obligation with all their colleagues. Putting the proposition another way, the Fifth Streeters, as lawyers, lacked the power to refuse to accept new appointments.[10] Their collective act was merely a message, albeit a dramatic one, to the court and to the community. The message was, in essence, that the lawyers were being inadequately compensated and that their clients were being inadequately represented under the existing system.[11] Therefore, the lawyers said, we want it known that we no longer desire to take part in it.

This is far different from the F.T.C.'s characterization of their conduct (also cited in the petitioner's brief at 41) as having "dramatically reduced the supply of lawyers to the city's CJA program," "adversely affected the city's ability to meet its constitutional obligation to provide counsel for indigent defendants," and "forced the city government to increase the CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the [lawyers]." Pet. App. 96a. The F.T.C. is wrong. As a matter of law, the D.C. Superior Court, and not the lawyers admitted to its bar, controlled and still controls the supply of lawyers to the CJA program.

Unlike the lawyers writing title insurance policies for collectively-fixed prices in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), lawyers appointed to indigent defense cases lack the ability to withhold their services if their

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[10] This is notwithstanding the written petition signed by a number of attorneys which stated, "[U]nless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act." *S.C.T.L.A.*, 856 F. 2d at 230. Apparently, none of the boycotting attorneys were appointed to cases by the court while the boycott was in progress, so the collective "refusal" to accept new cases was never tested. Under the authority cited in n. 10, *supra*, any such refusal would have been punishable under the trial court's contempt power.

[11] Even the F.T.C., in its opinion, conceded that "[W]e have no reason to doubt that the respondents are indeed concerned about Sixth Amendment rights," Pet. App. 106a, and "[W]e do not question the respondents' genuine concern for their clients", Pet. App. 110a, before finding that the lawyers' motivation was primarily commercial, and not political.

desired price is not met. A threat to do so cannot be carried out, at least without running afoul of a trial court's contempt power.[12] The actual function of such a threat is to communicate that the lawyers are upset. The Fifth Streeters had no coercive power, and no ability to fix prices at all. They could rely only on their ability to communicate and persuade.[13]

D. The Anti-Competitive Goal of the Respondents Was Not Subject to Anti-Trust Sanctions

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[12]Alternatively, the court could require acceptance of appointed cases as a condition for admission to practice before it. See *United States v. Dillon*, *supra*, n. 10.

[13]To the extent the lawyers formed a professional judgment, whether individually or collectively, that their clients were receiving inadequate representation because of the low level of compensation paid to appointed counsel — the F.T.C. does not seriously dispute that this happened, see n. 12, *supra*, while the 1975 report of the Austern-Reznick committee tends to support such a conclusion, see n. 8, *supra*— then surely they had a professional and ethical obligation, and a responsibility to the justice system, to remedy the situation if they could. It is difficult to imagine what additional steps they might have taken short of a boycott. Enlist the aid of the local bar association? They tried that. The D.C. bar passed a resolution calling for a rate increase. Pet. App. 178a. Shortly afterward, a bill providing for a rate increase was introduced in the D.C. City Council, but it died in committee. Pet. App. 178a-179a. Ask the Superior Court's Chief Judge for help? They tried that. He declined because his court might have to consider the legality of any bill passed by the City Council. Pet. App. 179a. Lobby the Mayor's office? They tried that. They were told they needed the Chief Judge's support if the legislation was to get the Mayor's support. Pet. App. 180a. Ask the Chief Judge for help again? They tried that, repeatedly. He always declined. *Id.* Lobby the City Council? They tried that. A hearing was held, the lawyers' fee increase stood unopposed on the merits, and the lawyers were told that no one in the city government opposed their demand, but no funds were appropriated for the increase. Pet. App. 182a-183a. Buttonhole the Mayor? They tried that. He was sympathetic but could provide no source of additional funds. Pet. App. 183a-184a. Threaten to boycott? They tried that. The result was unproductive. Pet. App. 186a-187a.

The *Noerr-Pennington* doctrine,[14] widely discussed in the Administrative Law Judge's findings, the F.T.C.'s opinion, the court of appeal's opinion, the F.T.C.'s brief, and, no doubt, in the briefs of the respondents/cross-petitioners and their other supporting *amici*, immunizes from anti-trust sanctions otherwise lawful attempts by business competitors to communicate with and persuade public officials to adopt legislation or government policy. This is is so even when the sought-after government action would have an anti-competitive effect,[15] and even when the communications used are deceptive to the public.[16]

Even following the restrictive interpretation of *Noerr-Pennington* urged by the F.T.C., see Petitioner's Brief at 14, federal anti-trust law fails to reach the publicized boycott initiated by the respondents in order to induce the D.C. City Council to raise their statutory fees. Because their conduct had no effect on the supply of attorneys eligible for appointment to criminal cases, the boycott itself was not violative of federal anti-trust law. While the lawyers' goal was to enact anti-competitive legislation, under the *Noerr-Pennington* doctrine this did not subject the lawyers to further anti-trust liability.

CONCLUSION

The judgment of the court of appeals should be vacated and the matter remanded with instructions to direct the Federal Trade Commission to dismiss its charges against the respondents.

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[14] *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

[15] *Noerr*, 365 U.S. at 136; *Pennington*, 381 U.S. at 670.

[16] *Noerr*, 365 U.S. at 140. Even if the *Noerr-Pennington* doctrine does not protect the lawyers' boycott, as the court of appeals found, the lawyers' lack of coercive power affecting the supply of CJA lawyers to the Superior Court would demonstrate a lack of economic power in the relevant market. Therefore, the analysis employed by the court of appeals also compels dismissal of the F.T.C.'s charges.

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INTRODUCTION

The Amici States submit this brief in support of the Petitioner Federal Trade Commission. The decision of the District of Columbia Circuit in *Superior Court Trial Lawyers Association v. Federal Trade Commission*, 856 F.2d 226 (D.C. Cir. 1988), should be reversed.

INTEREST OF THE AMICI STATES

The Amici States have a vital interest in preventing an unwarranted expansion of immunity from the antitrust laws. First, the attorneys general are the chief law officers of their states and are charged with the duty of enforcing the antitrust laws. As such, they are the primary public enforcers of the state antitrust laws, which are often interpreted in conformity with federal law.[1] The attorneys general also represent their states and political subdivisions in federal antitrust actions for damages and injunctive relief. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states.[2] The states play a major role in antitrust enforcement and have a substantial interest in making sure that the antitrust laws are interpreted in accord with antitrust policy and the Supreme

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[1] E.g., *Red Wing Shoe Co., Inc. v. Shearer's, Inc.*, 1989 (CCH) Trade Cas. ¶ 68,575 (Tex. Civ. App. 1989).

[2] 15 U.S.C. § 15(c); *Georgia v. Pennsylvania R. R. Co.*, 324 U.S. 439 (1945) (common law parens patriae); *Hawaii v. Standard Oil*, 405 U.S. 251 (1972).

Court's prior decisions. Immunizing boycotts that are utilized to impose price-fixing agreements ("price-fixing boycotts") would allow anti-competitive conspiracies to continue unchecked.

Moreover, the attorneys general represent municipalities, counties, state agencies and other governmental entities whose purchases together account for 12% of the gross national product.[3] The attorneys general have a vital interest in maintaining the integrity of the process by which those transactions are accomplished. The novel exemption fashioned by the court of appeals would corrupt the process by which governments acquire goods and services and would virtually invite imposition of price-fixing boycotts against governments.

In addition, these local governments administer numerous programs similar to the District of Columbia's program for appointment of private counsel to represent indigent persons charged with crimes in the District of Columbia Superior Court. Expanding the limits of First Amendment protection in the manner urged by the respondent Superior Court Trial Lawyers ("SCTLA") would create an enormous loophole in antitrust law that would inevitably impede states' efforts to preserve and foster competition.

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[3] U. S. Bureau of the Census, statistical Abstract of the United States 1989, at 421 (109th ed. 1988). In 1987, state and local government purchases amounted to 542.8 billion dollars. *Id.*

As the primary public enforcers of the state antitrust laws and as representatives of the primary victims of the anticompetitive conduct encouraged by the lower court's opinion, the Amici States have a substantial interest in ensuring that federal courts apply the antitrust laws in a manner consistent with underlying congressional policy, this Court's past decisions, and sound public policy.

The Amici States support the Federal Trade Commission's contention that a price-fixing boycott directed at a government purchaser is a *per se* violation of the Sherman Act without regard to a demonstration of market power.

SUMMARY OF ARGUMENT

1. The court of appeals erred in holding that the "use of the *per se* rule without proof of market power is inappropriate as applied to a price-fixing boycott that served, in part, to make a statement on a matter of public debate." This Court's most recent pronouncement of the *Noerr* doctrine[4] in *Allied Tube & Conduit Corp. v. Indian Head*, 108 S. Ct. 1931 (1988), resolves the question whether a price-fixing boycott, such as that at issue here, is protected activity under the First Amendment and beyond the reach of the Sherman Act. Under *Allied Tube*,

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[4] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 123 (1961).

the SCTLA's price-fixing boycott at issue is not protected as "political activity" and is not protected as a "political boycott." It was unnecessary and redundant for the court of appeals to analyze the price-fixing boycott as "expressive conduct." The proper way to address the First Amendment concerns is with application of the *Noerr* doctrine and not by eroding the *per se* rule.

2. The court of appeals concluded that before a price-fixing boycott could be declared unlawful, proof of significant market power was required in order to demonstrate that the boycott succeeded because it was coercive rather than persuasive. The court of appeals' holding contravenes over eighty years of antitrust jurisprudence in which this Court has consistently held that horizontal combinations formed for the purpose and effect of tampering with the price of a commodity and service are unlawful *per se* under the Sherman Act. Such agreements are unlawful *per se* without any demonstration of market power. Requiring proof of market power to condemn a price-fixing boycott is unprecedented and creates formidable barriers to antitrust enforcement. Moreover, it replaces the efficiency and clarity of the *per se* rule with a novel market power test that promotes confusion.

3. The court of appeals' application of market power to determine the lawfulness of a restraint of trade involving "expressive conduct" goes well beyond this Court's prior application of market power analysis. The absence of market power does not justify a naked restriction on price or output.

Moreover, the purpose of inquiries into market power is to determine the actual or potential anticompetitive effects of an arrangement. Proof of actual anticompetitive effects obviates the need for inquiry into market power. The court of appeals rejected traditional demonstrations of market power and required proof of market power sufficient to demonstrate that the boycott succeeded because it was "coercive rather than persuasive." Such a requirement is unprecedented and is virtually impossible to apply. The court of appeals gave no useful guidance regarding what level of market power suffices to render unlawful a price-fixing boycott that is claimed to be "expressive conduct."

4. If the defense that price-fixing is being used to communicate a point of view can render an otherwise *per se* violation of the antitrust laws lawful, it is likely to be invoked in every case. It will substantively weaken antitrust enforcement and will encourage price-fixing at least with respect to goods and services purchased by governments.

ARGUMENT

The court of appeals held that a concerted boycott by competing private practice attorneys in order to increase fees paid for their representation of indigent criminal defendants may be constitutionally protected activity. The court recognized that the SCTLA boycott could properly be condemned as a *per se* violation of the Sherman Act unless it came within the protection of the First

Amendment. *Superior Court Trial Lawyers Association*, 856 F.2d at 241.[5]

In reviewing possible sources of protection, the court rejected the claim that SCTLA's conduct was entitled to complete First Amendment immunity under the *Noerr* doctrine. *Superior Court Trial Lawyers Association*, 856 F.2d at 247. The court also rejected SCTLA's contention that its conduct was a "political boycott" and thereby completely immune under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). *Id.* Though the court of appeals found the boycott was not immune from the antitrust laws under either *Noerr* or *Claiborne*, it concluded that the conduct could not be condemned without proof of market power. The court reached this conclusion by applying the test for evaluating "expressive conduct" articulated in *United States v. O'Brien*, 391 U.S. 367 (1968). In applying the *O'Brien* test, the court concluded that use of the *per se* rule "without proof of market power is inappropriate as applied to a boycott that served, in part, to make a statement on a matter of public debate." *Superior Court Trial Lawyers Association*, 856 F.2d at 250.

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[5] "Since no 'pro-competitive' justification, that is no justification that is consistent with the purposes of the antitrust laws, has been offered in its defense . . . the boycott could properly be condemned as a *per se* violation of section 1 of the Sherman Act. . . ." *Superior Court Trial Lawyers Association*, 856 F.2d at 241.

I. THE COURT OF APPEALS EVISCERATES THIS COURT'S DECISION IN *ALLIED TUBE*.

The Amici States assert that the court of appeals erred when it applied the *O'Brien* test after holding that SCTLA's horizontal price-fixing boycott was not immunized under *Noerr* or *Claiborne Hardware* pursuant to this Court's guidance in *Allied Tube*. *Allied Tube* is controlling precedent which resolves the First Amendment issues the court of appeals raised by applying the *O'Brien* test. The court of appeals' action has the effect of nullifying the precedential value of *Allied Tube* in governing the application of the Sherman Act to restraints of trade like the SCTLA boycott.

In the development of the *Noerr* doctrine, this Court has crafted a careful balance between the Sherman Act and the First Amendment. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Allied Tube & Conduit Corp. v. Indian Head*, 108 S. Ct. 1931 (1988). There this Court recognized that the antitrust laws do not apply to concerted solicitation of anticompetitive government action unless the concerted solicitation itself amounts to a mere sham.

The Court in *Noerr* defined for the first time the relationship between the First Amendment right to petition and the Sherman Act. The Court held that an open public campaign designed to influence the legislature would not violate the antitrust laws even though it had an anticompetitive effect. This Court refused to "lightly impute to Congress an intent to invade [First Amendment] freedoms." 365 U.S. at 138. It reasoned that the legislative history of the Sherman Act provided no basis for concluding that its purpose was "to regulate, not business activity, but political activity." *Id.* at 137. In *Pennington*, the Supreme Court extended the doctrine to attempts to influence the executive branch. This Court stated that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670.

In *Allied Tube*, however, this Court determined that even apart from any finding of mere sham, the *Noerr* doctrine does not immunize all petitioning conduct. This Court held that *Noerr* immunity does not protect the collective efforts of a private standards setting organization merely because the model codes agreed upon are subsequently adopted by governments. This Court established guidelines for determining whether collective conduct falls within the ambit of *Noerr*. There the Court said that "the scope of protection depends on the source context, and nature of the anticompetitive restraint at issue." *Allied Tube*, 108 S. Ct. at 1936.

In the instant case, the court of appeals acknowledged that "dicta in *Allied Tube* strongly suggest that *Noerr* does not extend to restraints indistinguishable from the one before us." *Superior Court Trial Lawyers Association*, 856 F.2d at 247. The court of appeals quoted the following passage from *Allied Tube*:

> We cannot agree with Petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. But see *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-463 (1945). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. But see *Georgia v. Evans*, 316 U.S. 159 (1942). Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action.

Allied Tube, 108 S. Ct. at 1938-39 (parallel citations omitted). The court of appeals correctly determined that *Noerr* immunity was not available

to protect the SCTLA boycott from antitrust scrutiny. *Superior Court Trial Lawyers Association*, 856 F.2d at 247.

Moreover, respondents' boycott is not entitled to First Amendment protection as a "political boycott" under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). There, this Court held that a boycott of white retailers by black consumers in order to vindicate important constitutional rights was protected by the First Amendment from a claim that it violated state tort law. The "political boycott" doctrine articulated in *Claiborne Hardware*, however, does not encompass commercial boycotts by economic competitors who stand to reap economic benefit for themselves. Citing *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the *Claiborne* Court said, "[t]he right of business entities to 'associate' to suppress competition may be curtailed." *Id.*

In *Allied Tube*, this Court reiterated that *Claiborne Hardware* is limited to cases that do not involve economic competitors seeking economic benefits.

> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), is not to the contrary. In that case we held that the First Amendment protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of

> demands for equality and racial justice. Although the boycotters intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market. *Id.*, 458 U.S., at 914-915. Here, in contrast, petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete.

Allied Tube, 108 S. Ct. at 1941 (parallel citations omitted).

The court of appeals applied the *Claiborne Hardware* analysis to the SCTLA boycott and concluded that it was outside the protection of the First Amendment. The court noted that the First Amendment protection in *Claiborne Hardware* "rests on the findings that the boycott was not motivated by any desire to lessen competition or to reap economic benefits. . . ." *Superior Court Trial Lawyers Association*, 856 F.2d at 245.

The cited passages from *Allied Tube*, although dicta, virtually dispose of the SCTLA boycott as if it were then before the Court. The SCTLA boycott is not "political activity" protected by the *Noerr* doctrine and is not a "political boycott" protected by *Claiborne Hardware*. The court of appeals concluded, however, that the absence of protection

under either *Noerr* or *Claiborne Hardware* did not conclusively resolve the claim that the SCTLA's boycott is entitled to First Amendment protection.

Notwithstanding the court of appeals' recognition and application of *Allied Tube* in reviewing the SCTLA's boycott, the court determined further analysis was needed before the boycott could be condemned under the Sherman Act. The court's justification for further analysis was the presence of an element of expression contained in the boycott warranting First Amendment protection. *Superior Court Trial Lawyers Association*, 856 F.2d at 247. The court of appeals turned to the test first enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968), to evaluate the First Amendment protection of "expressive conduct." This four-part test was devised by this Court to determine whether a Vietnam War protestor's draft card burning was protected under the First Amendment. This Court held that a "regulation is sufficiently justified (1) if it is within the constitutional power of the government; (2) if it furthers an important or substantial government interest; (3) if the government's interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms was no greater than is essential to the furtherance of that interest." *Id.* at 377.

The court of appeals easily found that condemnation of the SCTLA boycott met the first three parts of the *O'Brien* test. *Superior Court Trial Lawyers Association*, 856 F.2d at 248. With

respect to the fourth requirement, however, -- that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of the governmental interest -- the court of appeals concluded that a demonstration of market power was essential to evaluating the importance of the governmental interest at stake here.

It was error to use the *O'Brien* test after the court had already determined that under *Allied Tube* the price-fixing boycott was commercial activity primarily motivated by economic self-interest and thereby within the reach of the Sherman Act. In determining that the boycott was commercial activity and not political activity, the Court had already balanced the respective interests of society in our system of free enterprise with its unfettered marketplace against the First Amendment rights of speech and petition. The court of appeals recognized that it was in fact "[a]ccommodating the government's interest in regulating harmful economic activity to the right of citizens to engage in joint political action. . . ." *Superior Court Trial Lawyers Association*, 856 F.2d at 246.

The *O'Brien* balancing of governmental rights against individual rights was subsumed in the court of appeals' *Allied Tube* analysis because *Noerr* and *Claiborne Hardware*, in essence, address in an economic setting petitioning the government and speech elements of a boycott as "expressive

conduct."[6] The court of appeals analyzed the SCTLA boycott under *Allied Tube*, balanced the competing interests, and concluded that the government's interest predominates, that is, the Sherman Act was applicable to declare the price-fixing boycott unlawful.

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[6] In *Claiborne*, this Court addressed the validity of economic regulation that "may have an incidental effect on rights of speech and association." *Claiborne Hardware*, 458 U.S. at 912. In *Claiborne*, this Court applied the *O'Brien* test to evaluate the validity of economic regulation that would have rendered the NAACP boycott unlawful, *Id.* at n.47. *Claiborne* analyzed the "petitioning" element of the NAACP boycott under *Noerr*. *Id.* at 913-14. ("It is not disputed that a major purpose of the boycott in this case was to influence governmental action.") The speech element was evaluated under the *O'Brien* test. "The established elements of speech, assembly, association and petition, though not identical, are inseparable." *Id.*, at 911. The following passage from *Noerr* demonstrates that there, the court was in fact engaged in the same sort of analysis.

> The proscription of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. *Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities*, a caution which has been reflected in the decisions of this court interpreting such legislation.

Noerr, 365 U.S. at 141.

To balance these interests once again under *O'Brien* in the guise of "expressive conduct" was redundant. Embarking on the *O'Brien* test after having already determined that the boycott was within the reach of the Sherman Act was error. The court of appeals compounded its error when it reached inconsistent conclusions using the two approaches. The court of appeals in applying *O'Brien* lost sight of the fact that the *Allied Tube* analysis is by its nature limited to an inquiry into whether antitrust laws apply to particular conduct at all. In that sense, *Allied Tube* is a restatement of the *O'Brien* test appropriate to the commercial context of the antitrust laws. Neither *O'Brien* nor *Allied Tube* stand as a warrant for the court to have engaged in wholesale reordering of rules of law already found applicable.

II. THE COURT OF APPEALS' ABROGATION OF THE *PER SE* RULE OBSTRUCTS EFFECTIVE ANTITRUST ENFORCEMENT.

The court of appeals' application of the *O'Brien* case to the facts here is unprecedented. It determined that a naked price-fixing boycott that resulted in actual detrimental effects, could not, on that basis alone, be condemned. This determination was based upon the fact that overt acts in furtherance of the restraint of trade constituted "expressive conduct" which raised First Amendment considerations. The court of appeals concluded that before the restraint of trade could be declared unlawful, proof of significant market power -- which would conclusively demonstrate that the

boycott succeeded because it was "coercive rather than persuasive" -- was required. *Superior Court Trial Lawyers Association*, 856 F.2d at 253.

The court of appeals' holding contravenes over eighty years of precedent, in which this Court has constantly adhered to the principle that horizontal combinations formed for the purpose and effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity or service are unlawful *per se* under the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *See also United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). The court of appeals' determination also contravenes this Court's statement that even under rule of reason analysis, proof of market power is not necessary to determine the unreasonableness of a restraint of trade if actual anticompetitive effects are shown. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

To require proof of "market power" to condemn a naked price-fixing boycott creates a formidable obstacle to state and federal enforcement of the antitrust laws. The court of appeals' novel market power requirement would, if adopted, complicate, forestall, and possibly preclude condemnation of clearly anticompetitive conduct and weaken deterrence of undesirable economic behavior.

The court of appeals' subordination of the antitrust rights of the public to economic interests -

of competing businessmen is inconsistent with previous statements of this Court regarding the importance of those antitrust rights. For example, this Court, in *United States v. Topco Associates*, 405 U.S. 596, 610 (1972), stated:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

Next, the court of appeals also reasoned that the *per se* rule could be abandoned here because it is not a statutory command, but merely a rule of administrative convenience. *Superior Court Trial Lawyers Association*, 856 F.2d at 249. The *per se* rule is more than an administrative convenience.[7]

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[7] Moreover, the court of appeals erred in concluding that the *per se* rule, even if viewed only as an administrative aid, should not be upheld under the *O'Brien* test. In *United States v. Albertini*, 472 U.S. 675 (1985), this Court held that the general exclusion of a "bar letter" receipient from a military open house does not violate the First Amendment, stating that:

> Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. (Citation omitted.) Instead, an incidental burden on speech is no greater than is essential and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

Id., at 689.

This Court has recognized that the "*per se* rule" is a valid and useful tool for antitrust policy and enforcement to preserve this nation's economic freedoms.[8] *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 5 (1978). This Court in *Northern Pacific Railway Company v. United States*, 356 U.S. 1, 5 (1958) stated:

> This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken.

See also 7 P. Areeda, *Antitrust Law*, ¶1509, at 408-414 (1986).

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[8] State antitrust law, either through case law or statute, expressly recognizes price-fixing agreements and other similar conduct as *per se* violations. *E.g.*, Conn. Gen. Stat. Sec. 35-28(a)-(d) (1989); *Wedgewood Investment Corp. v. International Harvester Co.*, 126 Ariz. 157, 613 P.2d 620 (App. 1978); *Oakland-Alameda County Builders' Exchange v. Lathrop Const. Co.*, 4 Cal. 3d 354, 362-365, 93 Cal. Rptr. 602, 482 P.2d 226 (Cal. 1971); *Colorado v. Colorado Springs Board of Realtors*, 692 P.2d 1055, 1062 (Colo. 1984).

If the defense of "expressive conduct" (i.e., that price-fixing is being used to communicate a point of view) can render an otherwise *per se* violation of the antitrust laws lawful, it is likely to be invoked in every case. The result will burden litigation and, by holding out hope of exculpation, tempt more businessmen into naked trade restraints such as the price-fixing boycott at issue here. Thus, the "potential threat to the central nervous system of the economy," emasculation of the Sherman Act, and replacement of its philosophy with one which is "wholly alien to a system of free competition" apprehended and rejected by this Court in *Socony* will be revived.

In addition to prohibiting application of *per se* analysis, the court of appeals' use of market power to determine the lawfulness of a restraint of trade involving "expressive conduct" goes well beyond this Court's prior application of market power analysis. The court of appeals ignored this Court's statements in *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 109-10 (1984):

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.

The court of appeals recognized that the SCTLA boycott was a naked restriction on price or output but still held that market power analysis was essential before the boycott could be declared unlawful. *Superior Court Trial Lawyers Association, passim.*

The court of appeals' decision elevates market power from a mere "surrogate" for anticompetitive effects to the very measure of the government's interest in prohibiting restraints of trade. This application of market power analysis is without precedent.

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'
> 7 P. Areeda, Antitrust Law, ¶1511, p. 429 (1986).

FTC v. Indiana Federation of Dentists, 476 U.S. at 460-61.

The court of appeals accepted the Commission's findings of the SCTLA boycott's actual detrimental effects.[9] But, the court of appeals rejected the conclusion that such proven effects mandated a determination of unlawfulness. In addition, the court of appeals cautioned that even a finding of significant market power by the Commission on remand may not justify the condemnation of an "expressive" boycott. The court of appeals' imposed duty to weigh the value of alleged expressive conduct against the potential harm from such conduct, as measured by the participants' market power, obviously exceeds the proper role of any court.

The court of appeals' decision would replace the efficiency, clarity and certainty of the *per se* rule with a novel market power test that will promote confusion and attempted restraints of trade in the name of "expressive conduct." This decision is devoid of useful guidance to aid the Commission or the Amici States to determine what future expressive price-fixing boycotts and other types of *per se* restraints may remain unlawful.

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[9] The effects "dramatically reduced the supply of lawyers to the city's indigent defendant program; adversely affected the city's ability to meet constitutional obligations to provide counsel for indigent defendants; and forced the city government to increase CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the [boycotters]." *See Superior Court Trial Lawyers Association*, 856 F.2d at 251.

The court's opinion, raises the possibility that society must tolerate anticompetitive activities if they can be successfully packaged as "expressive" boycotts.

The Amici States, therefore, respectfully request that this Court reject the court of appeals' market power requirement for horizontal price-fixing boycotts and other types of conduct that have been previously determined by this Court to be unlawful *per se*. The application of market power analysis to substantiate an otherwise naked restriction on competition whenever "expressive conduct" is present, emasculates the Sherman Act, removes the deterrent effect of the *per se* rule and restricts effective law enforcement. The proper balancing test is that expressed in *Allied Tube* concerning applicability of the *Noerr* doctrine and *Claiborne Hardware*.

III. CROSS-PETITIONERS' CLAIM THAT THEIR PRICE-FIXING BOYCOTT IS "POLITICAL ACTIVITY" BEYOND THE REACH OF THE ANTITRUST LAWS IS WITHOUT SUPPORT.

Respondents, through their cross-petition, attempt to shroud their naked price-fixing boycott from antitrust scrutiny by asserting that the boycott is protected under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), as "political" activity. The Amici States are aware of no legal basis or case precedent to support respondents' claims. As presented earlier, *Allied Tube* resolves this issue.

Moreover, respondents' claimed motivation to advance the constitutional rights of indigent criminal defendants should not totally remove a price-fixing boycott from the scope of the antitrust laws. If so, antitrust enforcement will become dependent upon the creativity of the participants of a particular restraint of trade to invent political and social objectives for their anticompetitive actions. Businesses will use this "political activity protection" to apply coercive economic sanctions against governmental bodies to force regulatory changes concerning their businesses whenever they disagree with a governmental regulation or rule. It will also encourage predatory activities in the name of "political concerns." The court of appeals acknowledges as much in the following passage:

> [I]mmunizing all non-violent boycotts aimed at affecting the legislative process would free the businesses that must now compete to supply this tremendous demand instead to "lobby" for increases in the prices they receive by collectively withholding production. . . . This is the stuff of which economic chaos is made in countries that tolerate coercive political action by industry, and from which the Sherman Act has shielded this country for almost a century.

Superior Court Trial Lawyers Association, 856 F.2d at 247.

The Amici States request that this Court reject respondents' argument. *Claiborne Hardware* does not permit the conclusion that a price-fixing

boycott or other restraints of trade are "political" activity protected under the First and Fourteenth Amendments whenever political and social objectives may be advanced. Indeed, this Court previously rejected this exact argument. In *Allied Tube*, this Court determined that restraints of trade are not protected under *Claiborne Hardware* where the participants were "at least partially motivated by the desire to lessen competition, and . . . stood to reap economic benefits. . . .," 108 S. Ct. at 1941.

Limiting *Claiborne Hardware* to situations where there is an absence of anticompetitive intent strikes a proper balance between First Amendment rights and government's legitimate and substantial interests in protecting competition. Reaffirming *Allied Tube* will continue to provide protection from the antitrust laws for true political activity such as occurred in *Claiborne Hardware* and *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980). Price-fixing boycotts or other restraints of trade with political attributes such as occurred in *Allied Tube* and this case, however, will continue to be subject to the full force and effect of the federal and state antitrust laws.[10]

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[10] Respondents in their cross-petition have not challenged the FTC's factual determination that respondents' boycott was designed to restrain competition for the direct economic benefit of its members. Also, the court of appeals' opinion specifically affirmed the FTC's finding that the boycott was motivated primarily by "economic self-interest." *Superior Court Trial Lawyers Association*, 856 F.2d at 246. These facts preclude a determination that respondents' boycott was "political" activity entitled to First Amendment protections.

Price-fixing boycotts and other restraints of trade performed with anticompetitive intent cannot be condoned as part of the "political" process.

CONCLUSION

The District of Columbia Circuit's opinion should be reversed.

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